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IN THE

Supreme Court of the United States

October Term, 1958.
No. 321

LANCASTER SECURITY INVESTMENT CORPORATION, a California corporation,

Appellant,

vs.

HOWARD M. KESSLER, STATE MUTUAL BUILDING & LOAN ASSOCIATION, and TITLE INSURANCE AND TRUST COMPANY, *et al.*,

Appellees.

Motion of Appellees Howard M. Kessler and Title Insurance and Trust Company to Dismiss or Affirm.

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SUBJECT INDEX

PAGE

Grounds upon which motions are made 2

A.

Rule 16(1)a 2

B.

Rule 16(1)b 3

C.

Rule 16(1)c 8

Comment on appellant's jurisdictional statement 21

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Davidow v. Lachman Bros. Inv. Co., 76 F. 2d 186	11
Mullane v. Central Hanover Bank & Trust Company, 339 U. S. 306, 94 L. Ed. 865	6, 7
Scott v. Paisley, 271 U. S. 632, 46 S. Ct. 591, 70 L. Ed. 1123	4, 8

RULES

California Rules on Appeal, Rule 1	2
Rules of the United States Supreme Court, Rule 16	1
Rules of the United States Supreme Court, Rule 16(1)a	2
Rules of the United States Supreme Court, Rule 16(1)b	3
Rules of the United States Supreme Court, Rule 16(1)c	8
Rules of the United States Supreme Court, Rule 16(3)	22

STATUTES

California Civil Code, Sec. 2924	3, 4, 11
California Civil Code, Sec. 2924(b)	3, 4, 5, 7, 17, 21, 22
California Code of Civil Procedure, Sec. 692	3, 4
United States Code Annotated, Title 28, Sec. 1254(2)	3
United States Constitution, Fourteenth Amendment	3

TEXTBOOK

Stern and Gressman, Supreme Court Practice (2d Ed.), p. 17	19

IN THE

Supreme Court of the United States

October Term, 1958.
No. 521

LANCASTER SECURITY INVESTMENT CORPORATION, a California corporation,

Appellant,

vs.

HOWARD M. KESSLER, STATE MUTUAL BUILDING & LOAN ASSOCIATION, and TITLE INSURANCE AND TRUST COMPANY, *et al.*,

Appellees.

Motion of Appellees Howard M. Kessler and Title Insurance and Trust Company to Dismiss or Affirm.

Appellees Howard M. Kessler and Title Insurance and Trust Comany, hereby and herewith move the Court to dismiss the Appeal taken herein, and to affirm the Judgment of the District Court of Appeal of the State of California, Second Appellate District, Division Two, a copy of which forms the Appendix to Appellant's Jurisdictional Statement, and base their Motions upon the following grounds, all as is specifically set forth in Rule 16 of this Court:

Grounds Upon Which Motions Are Made.

A.

Rule 16(1)a.

The Appeal is not within the jurisdiction of this Court because it is not taken in conformity to the Statutes or to the Rules of this Court (Rule 16(1)a).

The Appeal in this case—if it can be called such—was taken by means of a notice thereof contained in a telegram, all as will appear from the record filed in this Court. At the end of the telegram appears these printed words: "ATTORNEY MORRIS LAVINE ATTORNEY FOR LANCASTER SECURITY INVESTMENT CORPORATION, A CALIFORNIA CORPORATION."

In the Appendix to this Court's Rules appearing in 98 L. Ed. page 47, it is provided as follows: "The form and manner of signature of the Notice of Appeal should likewise comply with the Rules of the Court in which the Notice is to be filed." Rule 1 of the Rules on Appeal of the State of California, appearing in Vol. 36 Cal. 2d Reports, says: "The Notice shall be signed by the Appellant or his attorney." Nothing in the record indicates that either the Appellant or its attorney, Morris Lavine, signed any such notice. It is, of course, common practice to convey messages to a local telegraph office by a telephone call, either by the attorney or his secretary, which, of itself, negatives a "signature."

B.

Rule 16(1)b.

The Motion to Dismiss is also based on the ground that it does not present a substantial Federal question; or that the Federal question sought to be reviewed was not timely, or properly raised; or that the judgment rests on an adequate non-Federal basis (Rule 16(1)b). This Court will note from the record that in the Trial Court no constitutional questions whatsoever (either State or Federal) were raised. Such questions for the first time appear in Appellant's Opening Brief in the District Court of Appeal.

Section 1254(2) 28 U. S. C. A. provides that any such appeal as is here contemplated, precludes "review by Writ of Certiorari at the instance of such Appellant, and the review on appeal shall be restricted to the Federal questions presented."

On pages 4, 5, 6, 7, 8 and 9, of Appellant's Jurisdictional Statement, there is quoted the Fourteenth Amendment to the Constitution of the United States, Sections 2924 and 2924(b) of the Civil Code of the State of California, and Section 692 of the Code of Civil Procedure of the State of California. Although the heading of a statutory enactment probably is inconsequential nevertheless, the correct statutory heading of 2924(b), reads as follows: "REQUEST FOR COPY OF NOTICE OF DEFAULT AND SALE: FILING OF REQUEST: FORM AND CONTENTS: INDEX BY RECORDER: MAILING OF NOTICES: INCLUSION OF REQUEST IN INSTRUMENT: PUBLICATION OF NOTICE: RECITAL OF COMPLIANCE: EFFECT OF REQUEST."

Section 2924 of the Civil Code has been in force in the State of California since 1872 (86 years), with some minor amendments. Section 2924(b) of the Civil Code was enacted in 1933 (25 years) and a pertinent amendment was enacted in 1939; and Section 692 of the Code of Civil Procedure has been in force since 1872, with some minor amendments. It will be noted that Section 2924 of the Civil Code provides very specifically the steps to be taken in the foreclosure of a deed of trust (comparable, of course, to a "security deed" as is specifically referred to, hereinafter, in this Court's decision, in the case of *Scott v. Paisley,* 271 U. S. 632, 46 S. Ct. 591, 70 L. Ed. 1123). These steps are, in brief:

(1) That a notice of default must be recorded in the county in which the real property is situated, specifically naming the trustors, together with a description of the real property affected, and specifically setting forth the nature of the breach of the secured obligation and of the election of the beneficiary to cause the property to be sold to satisfy the obligation.

(2) That there must then be an elapse of three months.

(3) That there must then be given a Notice of Sale, setting the time and place thereof, in the manner provided by the provisions of Section 692 of the Code of Civil Procedure, which in turn provides

(4) That a Notice of Sale describing the property must be posted in one public place.

(5) That there must be a publication of said notice in a newspaper of general circulation once a week for a period of at least twenty days, and

(6) That a copy of said notice must be posted in a *conspicuous place on the property to be sold* at least twenty days before the sale.

Appellant, we contend, totally mis-construes the provisions of Section 2924(b) of the Civil Code, by claiming that some other or further notice should be given to Appellant. Section 2924(b) applies only to the particular situation it expressly covers, and by the terms of that section, it seeks to protect subsequent purchasers of encumbered property by permitting them to have specific registered mail Notice of Sale proceedings IF they comply with the provisions of that section.

This Court, we feel, will be quick to notice that the portion of that section referring to publication of a Notice "once a week for at least 4 weeks" applies simply, and solely, and only, by the express language of the Section to situations where NO address of the trustor or mortgagor is set forth in the deed of trust and where no request for notice has been recorded.

In this connection Appellant refers to Paragraph 7(b) of the Deed of Trust, which reads "This deed (referring, of course, to the Deed of Trust) applies to, inures to the benefit of and binds all parties hereto, their heirs, legatees, devisees, adminstrators, executors, successors and assigns."

Appellant *never was a successor or assignee* of any interest, whatsoever, in the Deed of Trust. Its purchase of the property after the Deed of Trust was recorded could not in any manner affect the Deed of Trust itself, and most certainly—as is expressly stated in cases hereinafter set forth—the entire purpose of Section 2924(b) was designed to relieve against the necessity of a Beneficiary, or a prospective purchaser at the sale, of examining perhaps a dozen deeds or other instruments of conveyance including estate proceedings in order to relieve himself of the responsibility of determining, at his peril,

who is the then true owner of the property. As has been heretofore pointed out, Appellant was thereby provided with an easy method to obtain specific notice, if he cared to avail himself of the provisions of that statutory enactment.

To refer, now to cited case law in the Jurisdictional Statement—Appellants seems to place great reliance upon the case of *Mullane v. Central Hanover Bank & Trust Company*, 339 U. S. 306, 94 L. Ed. 865. We submit that that case, in no way, substantiates appellant's position. The case—as this Court well knows—involves a notice to be given by the Trustee with respect to the settlement of its accounts as Trustee of a Common Trust Fund, which consisted of 113 separate trusts, approximately one-half of which were *inter vivos* and the other half testamentary. The Court in saying that personal service has never been regarded as an indispensable step to constitute due process, said specifically

> "We disturb none of the established rules on these subjects. No decision constitutes a controlling or even a very illuminating precedent for the case before us,"

and then said that

> "The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean*, 234 US 385, 58 L. ed. 1363, 34 S. Ct. 779, supra, and it must afford a reasonable time for those interested to make their appearance, *Roller v. Holly*, 176 US 398, 44 L. ed. 520, 20 S. Ct. 410, supra, and cf. *Goodrich v. Ferris*, 214 US 71, 53 L. ed. 914, 29 S. Ct. 580. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. The criterion is not the possi-

bility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals."

When it is realized that the notices required by the statutory enactments of the Sate of California (in effect since 1872) are so much more complete than the notice under consideration in the *Mullane* case, we feel that no other or better reasonable notice could be provided, and especially—with the enactment of Section 2924(b) of the Civil Code—a subsequent owner could very readily receive registered mail notices at whatever address he wished to state. To emphasize this situation, *a notice was posted on the subject property,* and it is but rudimental to say that the owner or its representative *would thereby obtain actual notice.*

In this regard it may be well, at this point, to call to the Court's attention the actual Deed of Trust involved herein, and the Trustee's Deed upon foreclosure, both of which constitute exhibits to the Appellees' answer in the lower Court. The Deed of Trust—which of course is a contract—provides in part as follows: "The recitals in such deed (meaning the trustee's deed) of any matters or facts, shall be conclusive proof of the truthfulness thereof." The trustee's deed upon foreclosure specifically states that notices of sale were posted for not less than 20 days prior to the date of sale in three public places in the City of Los Angeles (where the property is located), and that publication was had once a week for twenty days in a newspaper of general circulation in the Judicial District where the property is located, and that a copy of said notice was posted for that period of time "in a conspicuous place on the property to be sold."

C.

Rule 16 (1)c.

Appellees' Motion to Affirm the judgment sought to be reviewed is based "on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as to not need further argument" (Rule 16(1)c).

This Court has expressly passed upon the precise question here involved in the case of *Scott v. Paisley*, 271 U. S. 632, 46 S. Ct. 591, 70 L. Ed. 1123. As is sometimes glibly said, this is a "hog case" and not a "cow case." In this case the following situation was under consideration

> "In 1919 plaintiff purchased a parcel of real property which was subject to a security deed, which a previous owner had executed to secure a note for borrowed money. Thereafter, the holder of the note brought suit without any notice to the plaintiff and recovered judgment against the grantor in the security deed, and thereafter levied an execution upon the land, and after due advertisement sold it at public sale in satisfaction of the judgment. Plaintiff asserted that the sale was void on the ground that it violated due process and equal protection of the law clauses of the fourteenth amendment, *in that he could not be deprived of his property without notice or without an opportunity to be heard and set up a defense.*
>
> "The Supreme Court of Georgia affirmed, and this Court in holding that there was no violation of the Fourteenth Amendment stated, in that case, as follows:
>
> " 'Plainly the right of one who purchases property subject to a security deed, with a statutory power of sale which must be read into the deed, is no greater than that of one who purchases property subject

to a mortgage or *trust deed, with a contractual power of sale.* The validity of such a contractual power of sale is unquestionable. In *Bell Silver & Copper Min. Co. v. First Nat. Bank*, 156 U. S. 470, 477, 39 L. Ed. 497, 501, 15 Sup. Ct. Rep. 440, this Court said: "There is nothing in the law of mortgages, *nor in the law that covers what are sometimes designated as trust deeds* in the nature of mortgages, which prevents the conferring by the grantor or mortgagor in such instrument of the power to sell the premises described therein upon default in payment of the debt secured by it, and *if the sale is conducted in accordance with the terms of the power*, the title to the premises granted by way of security passes to the purchaser upon its consummation by a conveyance." In the absence of a specific provision to that effect, the holder of a mortgage or trust deed with power of sale, *is not required to give notice of the exercise of the power to a subsequent purchaser or incumbrancer; and the validity of the sale is not affected by the fact that such notice is not given. McIver v. Smith*, 118 N. C. 73, 75, 23 S. E. 971; *Atkinson v. Washington & J. College*, 54 W. Va. 32, 49, 46 S. E. 253; *Grove v. Great Northern Loan Co.*, 17 N. D. 352, 358, 138 Am. St. Rep. 707, 116 N. E. 345; *Hardwicke v. Hamilton*, 121 Mo. 465, 473, 26 S. W. 342; *Ostrander v. Hart*, ... N. Y. ....., 30 N. E. 504. And see *Watkins v. Booth*, 55 Colo. 91, 94, 132 Pac. 1141; and *Groff v. Morehouse*, 51 N. Y. 503, 505. In *Hardwicke v. Hamilton*, 121 Mo. 473, 26 S. W. 342, the Court said that "the law imposes no duty upon a person holding a prior mortgage or deed of trust to notify one holding a similar subsequent or junior lien or incumbrance upon the same property of his intention to sell the property under his mortgage or deed of trust. All that is required of him is to advertise and sell the property according

to the terms of the instrument, and that the sale be conducted in good faith." And in *Watkins v. Booth, supra*, 94, the court said that it was the *duty of the subsequent lienor "to keep advised as to proceedings in case of the former trust deed."* So a purchaser of land on which there is a prior security deed acquires his interest in the property subject to the right of the holder of the secured debt to exercise the statutory power of sale. *There is no established principle of law which entitled such a purchaser to notice of the exercise of this power. And Section 6037 neither deprives him of property without due process of law nor denies him the equal protection of the laws.'*

"Again in the case of *Bell Silver & Copper Mining Co. v. First Nat. Bank,* 156 U. S. 470, 477, and 39 L. Ed. 497, at page 501, this court said:

" 'There is nothing in the law of mortgages, nor in the law that covers what are sometimes designated as *trust deeds* in the nature of mortgages, which prevents the conferring by the grantor or mortgagor in such instrument of the power to sell the premises described therein upon default in payment of the debt secured by it, and if the sale is conducted in accordance with the terms of the power the title to the premises granted in that way of security passes to the purchaser upon its consummation by a conveyance. *Grant v. Burr,* 54 Cal. 298; *Bateman v. Burr,* 57 Cal. 480. The power of sale in the indenture, whether we call it a *deed of trust* or a mortgage, does not change its character as an instrument for the security of the indebtedness designated, but it is an additional authority to the grantee or mortgagee, and if he does not *choose* to foreclose the mortgage by any of the ordinary methods provided by law, he can proceed under the power added for the sale of the property, to obtain payment of the indebtedness. The insertion of a power of sale does

not affect the mortgagor's right to redeem so long as the power remains unexecuted and the mortgage is not, *as it may be*, foreclosed in the ordinary manner, but when a sale is made of the interest of the mortgagor, his right is wholly divested, embracing his equity of redemption.'"

The Circuit Court of Appeals (9th) which, of course, has jurisdiction over matters which arise in the Western States, including the State of California, has very specifically upheld the constitutionality of Section 2924 of our Civil Code on at least two occasions. In the case of *Davidow v. Lachman Bros. Inv. Co.* (1935), 76 F. 2d 186, the pertinent language of the Court reads

"'It is clear from the allegations of the bill and from the argument advanced on behalf of Appellant that the claim of violation of due process of law is based solely on the action of the various appellees in proceeding as they have under the power conferred by the deeds of trust and under what is asserted to be an erroneous interpretation of the statutes in question. *Neither the State of California nor any of its agencies or officers is charged with depriving appellant of his property without due process of law.* Under such circumstances, the allegations of the bill were insufficient to confer jurisdiction, for it is well settled, as said in *Kiernan v. Multnomah County* (C. C.), 95 F. 849, that: "The Fourteenth Amendment has reference exclusively to *State action, and not to any action by individuals.* It is a prohibition upon the State to 'make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' or which shall 'deprive any person of life, liberty, or property without due process of law.' It prohibits State legislation in violation of these rights. It does not refer to any action by

private individuals. (*Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667; *U. S. v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588; Civil Rights Cases, 109 U. S. 3, 11, 3 S. Ct. 18, 27 L. Ed. 835), otherwise every invasion of the rights of one person by another would be cognizable in the federal courts under this Amendment.'"

"Again in the case of *Curti v. Pacific Mtg. Guaranty Co.* (1936), 87 F. 2d 42, 43, our Circuit Court of Appeals again said:

"'Reversal is sought of a judgment of dismissal of a complaint challenging the sale of real estate hypothecated to secure payment of money at a stated time by virtue of a power of sale contained in the agreement of hypothecation pursuant to the provisions of Section 2924 of the Civil Code of California, charging that said section violated the "due process" clause of the Constitution of the United States (Const. Amend. 14), the hypothecation being made for security only, and that the procedure to enforce the contract must be by judicial procedure and sale upon execution by decree of court. No contention is made that the power of sale was not in all things strictly pursued.

"'(1) This section of the statute entered into and became a part of the deed of hypothecation as fully as if set out therein. It is not contended that the power of sale was not set out in the instrument, nor that the requirements of the Section 2924, *supra*, were not in detail performed.

"'(2, 3) *That the trustor has power to confer upon the trustee, who may be the obligee to the deed of trust, the power to sell in accordance with the terms of the power given and a sale so made passes good title to the property so sold has long since been judicially determined. Fogarty v. Sawyer*, 17 Cal. 589; *Bell Silver & Copper Mining Co. v. First Na-*

tional Bank, 156 U. S. 470, 15 S. Ct. 440, 39 L. Ed. 497; *Grant v. Burr*, 54 Cal. 298; *Bateman v. Burr*, 57 Cal. 480. The *"due process" clause is not violated by the provisions of section 2924, supra.*

"'(4) That valid title passed on execution of such contractual power is unquestionable. *Scott v. Paisley*, 271 U. S. 632, 46 S. Ct. 591, 70 L. Ed. 1123. This is a case where the constitutionality of a like statute of Georgia was attacked.'"

This Court has determined that the decisions of the California Courts over many, many years, have established "rules of property," which are to be treated as law by the Federal Courts.

"We quote the following general language in *Bucher v. Cheshire R. Co.* (1888), 125 U. S. 555, 583, 31 L. Ed. 795, 8 Sup. Ct. Rep. 974 (see Vol. XII California Law Review, page 427). The Court said

"'It is also well settled that where a course of decisions, whether founded upon statutes or not, *have become rules of property as laid down by the highest courts of the State*, by which is meant those rules governing the descent, transfer, *or sale of property*, and the rules which affect the title and possession thereto, they are to be treated as law of that State be the Federal Courts.'"

To show how the California Courts have established this rule of property in very explicit language, we set forth quotations from a text and a few of the many California cases which are here pertinent

"It is generally said in 34 California Jurisprudence 2d, 128-129:

"'Not less than 3 months after notice of default is given, the trustee, mortgagee, or beneficiary must

give notice of sale, stating the time and place thereof in the manner required for sales of real property on execution. A notice that does not meet the statutory requirements is invalid. *But no additional notice need be given. Except where he formally requests notice, the fact that the debtor is not personally notified is immaterial, so long as there is compliance with the conditions prescribed in the statute.'*

"In *Sargent v. Shumaker* (1924), 193 Cal. 122, 130, the Court's language is:

" 'The circumstance that the plaintiff did not know of the pending sale and was not notified thereof by either of the defendants is not, standing alone, of any importance herein. As this Court said in *Rauer v. Hertweck* (1917), 175 Cal. 278, 282: "There was no obligation upon them to give him any such notice. The statute defines how notice of an execution sale must be given. To say that a sale may be set aside because some other notice was not given *would be to amend the statute, and this we cannot, of course do.* When the officer conducting the sale has done the acts prescribed by the code, he has done his full duty. He is not required to search for the debtor and give him any further notice than that which the law exacts. Nor is any such duty imposed upon the judgment creditor. *Much less is one who may contemplate bidding at an execution sale called upon to concern himself with, the question whether the debtor has actual knowledge of the proceedings.*" '

"*Sargent v. Shumaker, supra,* involved an attack upon a trustee's sale by the administrator of the deceased trustor (debtor) who raised numerous contentions including lack of actual notice. The Court held for the defendant, reversing the trial court and concluded at page 137:

" 'These circumstances serve to bring this case fairly within the rule of *Rauer v. Hertweck, supra,*

which was summed up in the following language: "The attempt to show unfairness in the sale comes down simply to this: that the execution sale was *regularly made upon due statutory notice*, but that the judgment debtor did not, in fact, know of the sale, and no one gave him notice of it. He did, however, know that a judgment had been entered against him, and must be deemed to have known that his property might be levied on at any time. *He failed to pay the judgment*, and took no steps to protect his property until many months after the entry of judgment. He then found that a sale had been had, and that the time for redemption had expired. The resulting loss can more properly be attributed *to his neglect of his own interests* than to any unfairness on the part of the judgment creditor or the purchasers.'"

"In *Billings v. Farm Development Co.* (1925), 74 Cal. App. 254, 263-264, the Court stated:

"'The publication was in strict accord with the statute and the contract and the beneficiary was a lawful purchaser under the contract . . . It is also argued that the plaintiffs *should have been given personal notice of the sale. But such notice was not necessary and the failure to give it is not actionable.* (*Sargent v. Shumaker*, 193 Cal. 122, 130; *Babcock v. Brown*, 193 Cal. 345, 353.)'

"Again in *Ley v. Babcock* (1931), 118 Cal. App. 525, the appellants (trustors) contended that the Court erred in striking out their affirmative defense which pleaded that the sale was fraudulently made because personal notice had not been given them. The Appellate Court ruled against this contention, stating at page 528:

"'The Trial Court found that notice was given in full compliance with the terms of the deed of trust

and with the provisions of Section 692 of the Code of Civil Procedure. It was *not at any time necessary that personal notice be served upon the appellants;* it is sufficient if the statute and the terms of the trust deed are followed. (*Witter v. Bank of Milpitas,* 204 Cal. 570, 573.)'

"See also:

Meyer v. Zuber (1928), 92 Cal. App. 767, 772-773.

"A recent case in this regard, *Crofoot v. Tarman* (Jan. 7, 1957), 147 Cal. App. 2d 443, 305 P. 2d 56, carefully reviews the many cases in this State which deal with this subject. In this case, plaintiff had inquired of the secretary of the beneficiary as to the date of the sale and was erroneously told by her that the sale had been postponed to a certain date. There was no evidence that the misinformation was fraudulently given. The Court specifically held that where there was no proof that anything was done or left undone by the trustee, *that the inadequacy of price would not form a basis for the exercise of the Court's equity powers to set the sale aside.* The specific language of the Court is as follows:

" 'Turning now to the alleged irregularities in the sale and their effect upon the sale, Crofoot argues concerning the fact and the effect of the misinformation as to the date of sale which emanated from the secretary of Tarman's attorney. It appears that they do not in fact claim there were irregularities in the trustee's conduct of the sale, nor that anything done or left undone by the trustee was in violation of the trustee's authority or contrary to the trustee's duties.'

"And further:

" 'There is nothing in the record to the effect that anything done or left undone by the trustee *prevented*

the public from attending at the sale or in anywise discouraged bidding. Therefore, the trustee's sale cannot be set aside by reason of irregularities plus inadequacy of price.'

"It is most significant that learned counsel for the Appellant in this case has not even mentioned any California cases which are here apposite."

Lastly—although Appellant has fully quoted provisions of Section 2924b of the Civil Code—he totally ignores the provision contained in that section with respect to the recitals which are contained in the trustee's deed, all as was hereinabove briefly mentioned. To conclude this portion of our authorities in support of our motions and in support of the "rules of property" established in the State of California, with respect to that portion of that Code Section, we set forth a few California cases which expressly cover the situation:

"It is said in the case of *Central National Bank v. Bell*, 5 Cal. 2d 324, at 327:

" 'The defendants on the trial endeavored to show that the notices required by Section 692, subdivision 9, Code of Civil Procedure, did not *remain* posted for twenty days prior to the date of sale. The evidence was held inadmissible and excluded by the Court. The Court did not err in its ruling. It is sufficient in this respect to note that the trust deeds *provided that in event of sale thereunder, the recitals in the trustees' deeds, of default, request to sell, publication and posting of notice, postponements of sale, etc. should be conclusive evidence of all such facts recited.* In this action and on the record before us the defendants were concluded by the recitals in the trustee's deeds. (*Sorensen v. Hall*, 219 Cal. 680 (28 Pac. (2d) 667); *Stevens v. Plumas Eureka Annex Min. Co.*, 2 Cal. (2d) 493 (41 Pac. (2d) 927).)'

"Similarly, it was held in the case of *Cobb v. California Bank*, 6 Cal. 2d 389, at 390, as follows:

" 'The second point is equally untenable. The deed of trust under which the property was sold *contains the usual recitals that the recitals in the trustee's deed of any matters of fact affecting the regularity or validity of the foreclosure sale shall be conclusive proof of the truthfulness thereof, and that said trustee's deed shall be conclusive against all persons as to all matters of fact therein recited.* The trustee's deed recites that a copy of the notice of trustee's sale was posted in a conspicuous place on the property to be sold. *The appellants herein were concluded by these recitals in the trustee's deed.* (*Sorensen v. Hall*, 219 Cal. 680 (28 Pac. (2d) 667); *Central National Bank of Oakland v. Bell*, 5 Cal. (2d) 324 (54 Pac. (2d) 1107).)'

"An express agreement with respect to such recitals is not violative of any of the Sections of our Civil Code applicable thereto. Our Court said in *Pierson v. Fischer* (1955), 131 Cal. App. 2d 208, at 216:

" 'Appellant contends that to hold the recitals in the Trustee's deed be conclusive against him is to violate the provision of Section 2935 of the Civil Code which declares: "Any express agreement made or entered into by a borrower at the time of or in connection with the making of or renewing of any loan secured by a deed of trust, mortgage or other instrument creating a lien on real property, whereby the borrower agrees to waive the rights, or privileges conferred upon him by Sections 2924, 2924b, 2924c of the Civil Code, or by Sections 580a or 726 of the Code of Civil Procedure, shall be void and of no effect," and still further,

"'The argument is not sound, for the reason that the provisions in the deed of trust here in question *do not result in a waiver* of the rights or privileges conferred by the Civil Code sections referred to. Those sections, speaking generally, establish certain procedures in the exercise of powers of sale conferred by deeds of trust and in the remedies of the beneficiary. And concerning all of them, appellant, by the instrument he executed, declared that the recitals in a deed made by his trustee that all of the duties of the trust respecting the sale had been complied with should bind him. In short, *he thereby made the trustee his agent* with such powers that the trustee could bind him, notwithstanding he had not carried out the provisions of his trust.'

"See also *Karrell v. First Thrift of Los Angeles* (1951), 104 Cal. App. 2d 536, and two recent cases bearing the same title *Abrahamer v. Parks* (April, 1956), 141 Cal. App. 2d 82, and 85."

The Court is well aware that in order to invoke the jurisdiction of the Court, the lower Court's decision must be based *squarely* on the fiinding that State statutes are contrary to Federal law. In this connection it is said in the text entitled Supreme Court practice (2d Ed.), by Stern and Gressman, on page 17, as follows:

"In order for this jurisdiction to be invoked, the Court of Appeal's decision must be based *squarely* on a finding that a State Statute relied upon by Appellant is contrary to Federal law. If the decision rests upon State law grounds, appeal is improper. Public Service Commission v. Batesville Telephone Co., 284 U. S. 6."

and further:

"A 'State statute' in this context means every legislative action to which a State gives the force of

law. See Williams v. Bruffy, 96 U. S. 176, 183; King Mfg. Co. v. Augusta, 277 U. S. 100, 104."

Once again, in the same text, at page 58 we find the following:

> "It shall be emphasized that in respect to the construction of State Statutes, the State Court's views *are completely non-reviewable* by the Supreme Court. If the sole basis of the decision is one of construction, the case cannot be the subject of either appeal or certiorari. And where the validity of the statute has been sustained in the face of federal objections, the Supreme Court on appeal must accept the State Court's construction of the Statute and proceed to test the validity on that basis. *Guaranty Trust Co. v. Blodgett*, 287 U. S. 509, 513."

In the case just cited, this Court was called upon to set aside a Connecticut State decision upholding the imposition of a succession tax imposed by the State. In speaking for the Court, Mr. Justice Sutherland said:

> "We are not at liberty to disregard the explicit holding of the state court as to the basis of its decision, except for convincing reasons, which here we are unable to find. Compare *Columbia R. Gas & E. Co. v. South Carolina*, 261 U. S. 236, 245-247, 67 L. ed. 629, 633, 634, 43 S. Ct. 306. The entire effort of the court upon this point plainly was directed towards sustaining the view that the event sought to be taxed fell within the provisions of the act of 1923. There is a reference to the act of 1929, but the decision is definitely put upon the act of 1923, and is supported by considerations of such weight as to leave no occasion for dependence upon the later act; and the supposition that in fact effect was given to it is without warrant. Since the court below construed the act of 1923, without regard to

the act of 1929, as embracing the event sought to be taxed, and since in that view the question of contract impairment does not arise, we are bound by the decision of that court *as though the meaning as fixed by the court had been expressed in the statute itself in specific words. Great Northern R. Co. v. Sunburst Oil & Ref. Co.*, 287 U. S. 358, ante, 360, 53 S. Ct. 145, 85 A L. R. 254; *Supreme Lodge, K. P. v. Meyers*, 265 U. S. 30, 32, 68 L. ed. 885, 887, 44 S. Ct. 432."

And, lastly, we are of the belief that Appellant by taking this Appeal has elected the wrong remedy, if perchance it has one, for it is well said in the text just mentioned on page 19:

> "The only safe way to avoid unlitigated hazards just mentioned, in a case which involves other issues which the Supreme Court might be induced to review, is for Appellant to discard his right of appeal and to confine himself to an application for certiorari."

Comment on Appellant's Jurisdictional Statement.

We are somewhat concerned about the sincerity of Appellant and its attorney as to some bold assertions made in the Jurisdictional Statement. On page 11, thereof, he states that the provisions of Section 2924b "must be read into the contract and purchase and the failure to so publish voids the transaction." Again on page 13 it is said:

> "It follows, then, that Section 2924b of the Civil Code, inherently and as construed and applied in this case violates the Fourteenth Amendment to the United States Constitution. The court below has construed the statute to *require no notice to the new purchaser of property upon a sale* under a deed of trust if the new purchaser did not file any request with the county recorder."

Again on page 14, with specific regard, again, to the provisions of Section 2924b, he says that that Section

> "required specific notice by publication at least four weeks *before there could be any valid transfer or sale of the property and without which there was inadequate notice.* Construed otherwise this section would be violative of the due process clause of the Fourteenth Amendment requiring adequate notice."

We challenge Appellant's attorney in his Rely Brief (Rule 16(3)) to point out ONE WORD in Section 2924b that has *anything whatsoever to do with the purchase, transfer or sale of property* or that there could be no *valid sale or transfer of property* without notice. It is quite unthinkable that learned counsel would ask this Court to rewrite that Section to make it applicable to a transfer or sale of real property. Appellant purchased the property here involved SUBJECT to the deed of trust. It was most certainly aware of the delinquencies in payment of the indebtedness secured thereby, which, in the usual course of events, brought about a foreclosure sale. The record discloses that the purchaser at the sale was a total stranger—not the beneficiary of the deed of trust.

It is respectfully submitted that either Appellees' motion to dismiss or their motion to affirm be granted.

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